88-1138

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DELTA AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL,
Respondent,

and

EUGENE R. BLACK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "successorship doctrine" should be applied in an employment discrimination action to require an acquiring company to hire employees of an acquired company who do not meet the independent and presumptively lawful job qualifications of the acquiring company?

2. Whether the "successorship doctrine" was properly applied to find continuity of an acquired company's operations in an employment discrimination action where there was to be a temporary continuity of some of the acquired company's operations during a transition period but no continuity of the acquired company's operations after the acquisition was complete?

LIST OF PARTIES

The parties to this appeal are Delta Air Lines, Inc.,* as Petitioner, and Charles G. Criswell, as Respondent, and Eugene R. Black, Ernest F. Ellis, Arlie A. Gillespie, Peter T. Hoffman, Jack L. Keyes, Ben D. Laubacher, Jr., Robert A. Longwell, Alan L. McLaren, Phil G. Most, Lynn M. Norton, Glen P. Shannon, Donald C. Thompson and Henry J. Wiegand, as Respondents.**

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* The companies to be listed in accordance with Sup. Ct. Rule 28.1 are Atlantic Southeast Airlines, Inc., Comair, Inc., SkyWest, Inc., and Gatwick Handling, Ltd.

** Western Air Lines, Inc. was a party-defendant at the time of the March 30, 1987 Order of the United States District Court for the Southern District of California that is the subject of this Petition. However, on April 1, 1987, Western Air Lines, Inc., merged with Delta Air Lines, Inc., and Western Air Lines, Inc. no longer exists. Accordingly, Western Air Lines, Inc. is not a party to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Delta Air Lines, Inc. ("Delta") respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on October 12, 1988, affirming an Order of the United States District Court for the Central District of California entered on March 30, 1987.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 12, 1988, has not been reported. It is reprinted in the Appendix hereto, p. 1a, *infra.*

The Order of the United States District Court for the Central District of California (Tashima, D. J.), entered on March 30, 1987, has not been reported. It is reprinted in the Appendix hereto, p. 7a, *infra*.

JURISDICTION

On September 9, 1986, Delta and Western Air Lines, Inc. ("Western") entered into an Agreement and Plan of Merger which contemplated that Delta would merge Western into itself on April 1, 1987. This action began when Delta informed Respondents (former Western Second Officers) that they would not be offered cockpit positions with Delta because they did not meet Delta's independent Second Officer job qualifications. Respondents then sought an injunction in the United State District Court for the Central District of California against Delta by claiming that a May 12, 1981 injunction issued against Western in an action under the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* (the "ADEA"), required Delta to hire them as Second Officers. On March 30, 1987, the District Court entered an Order holding that, under the "successorship doctrine," the injunction against Western required Delta to hire the fifteen Respondents as Second Officers even though they did not meet Delta's Second Officer job requirements. Pursuant to 28 U.S.C. § 1291, Delta appealed that Order to the United States Court of Appeals for the Ninth Circuit. On October 12, 1988, the United States Court of Appeals for the Ninth Circuit entered an order affirming the District Court's March 30, 1987 Order. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

The Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. § 632, provides in pertinent part:

> (a) It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .
>
> (f) It shall not be unlawful for an employer, employment agency or labor organization—
>
> > (1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, ...

Code of Federal Regulations, Title 14, Section 121.383 (c) provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

On September 9, 1986, Delta and Western entered into an Agreement and Plan for Merger which contemplated that Delta would merge Western into itself on April 1, 1987 and that Western would no longer exist as a corporate entity as of that date. C.R. 425 at 2. At the time of that Agreement, the fifteen Respondents were employed by Western as Second Officers.[1] Although not

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[1] Second Officer is a term used by both Western and Delta to designate the pilot who occupies the third seat behind the Captain

required to do so, Delta voluntarily offered the Respondents employment with Delta effective April 1, 1987. Tr. 6; C.R. 421(a) at 6; C.R. 421(b) at 10; C.R. 423 at 7; C.R. 424 at 8. However, Respondents did not meet Delta's independent and long-established qualifications for its Second Officer positions. *Id.* Specifically, Respondents were disqualified from serving as Delta Second Officers because each was past his sixtieth birthday and Delta prohibits a pilot disqualified from Captain or First Officer (co-pilot) service by his age[2] or other reason from bidding down to or serving in the subordinate Second Officer position. *Id.*; Tr. 7, 10, 30, 31. Accordingly, because they did not meet Delta's Second Officer job qualifications, Delta informed Respondents that they could not be offered that position at Delta but they would be offered ground positions. *Id.*

On March 2, 1987, Respondents filed a Motion with the United States District Court for the Central District of California seeking an injunction that would require Delta to hire them as Second Officers. C.R. 419. In their Motion, Respondents contended that Delta was a "successor" to Western and was therefore bound by a May 13, 1981 injunction issued against Western in an ADEA action that prohibited Western from applying a similar but distinct job qualification to Second Officers. C.R. 216; C.R. 419. Two days before the April 1 acquisition date, the District Court issued an Order which held that, with respect to Respondents, Delta is a "successor" to Western and that therefore Delta was required to employ Respondents as Second Officers, notwithstanding the fact that they did not meet *Delta*'s independent qualifications for that position. *See* p. 8a, *infra*. The District Court

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and First Officer (co-pilot) in a three-man cockpit and, among other things, performs the duties of the flight engineer position.

[2] 14 C.F.R. § 121.383(c), the Federal Aviation Administration's "Age 60 Rule," prohibits service as a Captain or First Officer upon reaching the age of 60.

explained the basis for its Order by stating, "[i]t appears to the Court that Western's and Delta's flight operations will not be fully integrated until sometime in the future. At this point, then, Delta is a successor for the purposes of the pending motion." *See* p. 8a, *infra*. Delta appealed that Order to the United States Court of Appeals for the Ninth Circuit.

In its appeal, Delta argued that the District Court improperly applied the successorship doctrine to require Delta to hire as Second Officers former Western employees who did not meet Delta's independent Second Officer job qualifications. Delta also argued that the District Court had improperly found that Delta was a successor to Western on the basis of the fact that Western's pilot work force would not be completely integrated into Delta's pilot work force immediately after the merger since it was undisputed that it would be completely integrated after a short transition period. In fact, upon the completion of the merger and the integration of Western's work force into Delta's work force, it was undisputed that there would be no identifiable former Western operation. C.R. 425 at 4, 5; C.R. 428 at 3, 4; Tr. 12.

On October 12, 1988, the Ninth Circuit affirmed the District Court's Order. *See* p. 1a, *infra*. The Ninth Circuit held that the successorship doctrine could be applied to require an acquiring company to hire employees of the acquired company, even though they did not meet the job qualifications of the acquiring company. The Ninth Circuit also held that there was sufficient continuity of the Western operations to find that Delta was a successor to Western because Delta had not completely integrated the two pilot work forces on the April 1, 1987 effective date of the acquisition. Delta then timely filed this Petition.

REASON FOR GRANTING THE WRIT

I. By Applying The "Successorship Doctrine" In An Employment Discrimination Action To Require An Acquiring Company To Hire The Employees Of An Acquired Company Who Do Not Meet The Independent Job Qualifications Of The Acquiring Company, The Ninth Circuit Has Conflicted In Principle With the Decisions Of Other Circuits And Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

By requiring Delta to hire unqualified former Western employees, the Ninth Circuit applied the successorship doctrine in an unprecedented manner. It is undisputed in this action that the Delta Second Officer qualifications that Respondents failed to meet are presumptively lawful. However, even if that were not the case, Delta has successfully defended these qualifications against a claim that they were age discriminatory in an ADEA action. *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1300 (1987).[3]

When Delta denied Respondents Second Officer positions because they did not meet Delta's qualifications, Respondents did not challenge the lawfulness of these actions in an ADEA action against Delta. Instead, Respondents filed a Motion in District Court contending that they were exempt from *Delta*'s job qualifications because that District Court had enjoined *West-*

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[3] In that case, Delta maintained that its Second Officer job qualifications are either based on reasonable factors other than age ("RFOA") or, if age based, are justified as a bona fide occupational qualification ("BFOQ") reasonably necessary to the safe operation of Delta's business. *Iervolino v. Delta Air Lines, Inc., supra,* 796 F.2d at 1411; 29 U.S.C. § 623(f)(1). The jury entered a general verdict in favor of Delta and the United States Court of Appeals for the Eleventh Circuit affirmed the decision, holding that there was "substantial evidence" to support Delta's RFOA defense and that Delta's BFOQ defense was "amply supported by the record." *Id.* at 1419.

ern from applying similar, but distinct, qualifications that had been found to violate the ADEA. By exempting Respondents from Delta's Second Officer qualifications, the District Court and the Ninth Circuit denied Delta the right to once again establish the lawfulness of its qualifications and distinguish its qualifications from the former Western qualifications.[4] Thus, the Ninth Circuit's decision forced Delta to hire employees who clearly do not meet Delta's job qualifications without any finding that those qualifications were unlawful. The precedent set by the Ninth Circuit's decision both conflicts in principle with the decisions of other Circuits and presents an important question of federal law that this Court has not, but should, address.

In requiring Delta to hire employees that did not meet its presumptively lawful qualifications, the Ninth Circuit relied solely on the "successorship doctrine." This Court has not yet confronted that doctrine in an employment discrimination action. Several Circuits, however, have utilized that doctrine to determine whether an acquiring company will be required to remedy certain unremedied unlawful employment practices committed by the *acquired company* before the acquisition. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985); *In re National Air Lines, Inc.*, 700 F.2d 695 (11th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *EEOC v. MacMillan Bloedell Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974).[5] Under the doctrine, the acquiring company is

[4] For example, unlike Delta, Western formerly allowed down-bids by Captains to the Second Officer position in a broad variety of circumstances and the only circumstance in which Western denied down-bids was by Captains nearing age 60. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 392 (C.D. Calif. 1981).

[5] These courts have generally borrowed the doctrine from its use in the labor law context. *See, e.g., Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1975); *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973).

treated as an innocent party and it is the acts and employment decisions of the *acquired company* that are at issue. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985).

In the context in which the successorship doctrine is normally utilized, a company has unlawfully discriminated against an employee and is then acquired. Thus, although the acquiring company may continue to operate the business of the acquired company in substantially the same form, the acquired company no longer exists as an entity from which the victim of discrimination can seek a remedy. Although the acquiring company is an innocent party, if it is a "successor" to the acquired company, courts may order the acquiring company to remedy the unlawful practices of the acquired company (*e.g.*, by reinstating with back pay an employee discriminatorily discharged by the acquired company). *See, e.g., Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 746 (7th Cir. 1985). The courts and the National Labor Relations Board (in the labor law context) have transferred liability in this context when, *but for* the *acquired company's* unlawful discharge, the successor would likely have retained the employee after the acquisition had he still been employed by the predecessor at the time of the acquisiiton. *Id.*; *Thomas Engine Corp.*, 179 NLRB 1029, 1030 (1970). In such cases, the burden placed on the successor is de minimis because it is merely required to hire a particular qualified employee. *Musikiwamba v. ESSI, Inc., supra*, 760 F.2d at 747. Thus, the burden is substantially outweighed by the employee's right to a remedy even when the discriminating entity has disappeared after an acquisition. *Id.*

In contrast, the successorship doctrine is *not* applied to require an acquiring company to hire employees who do not meet its independent job qualifications. *See, e.g., In re National Air Lines, Inc.*, 700 F.2d 695 (11th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983); *Golden State*

Bottling Co., Inc. v. NLRB, 414 U.S. 168, 178, n.4 (1973). In that context, it is the acts of the *acquiring employer* that are at issue. If the refusal to hire, or a job qualification of the acquiring employer, is unlawfully discriminatory, the employees who are not hired have a remedy merely by filing an employment discrimination action against the acquiring employer. Thus, unless the acts at issue were committed by an *acquired employer* that has disappeared, the successorship doctrine is both unnecessary and inapplicable. As this Court stated in the labor law context, "the successor's obligations do not arise out of its own unfair labor practices." *Golden State Bottling Co., Inc. v. NLRB, supra*, 414 U.S. at 178, n.4.

Accordingly, although the National Labor Relations Board will apply the successorship doctrine to require a successor to reinstate with back pay employees who were unlawfully terminated by the acquired company, it will *not apply* the doctrine to issue a cease and desist order restricting the successor from engaging in unlawful acts, even if they are the same acts that were committed by the predecessor. *Id.*; *Thomas Engine Corp.*, 179 NLRB 1029, n.4 (1969), *enforced, United Auto Workers v. NLRB*, 442 F.2d 1180 (9th Cir. 1971). Thus, a successor cannot be required under the doctrine to hire an individual unlawfully terminated by the acquired company if it would not have hired the individual in any event because of its own independent hiring policies or decisions. *See, e.g., Thomas Engine Corp., supra*, 179 NLRB at 1030; *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 681 (9th Cir. 1980). If it is the *successor's* acts (whether based on the same or an entirely different policy as the acquired company) that have deprived the acquired employees of employment, they must seek a remedy directly against the successor by showing that *its* acts were unlawful.

In this case, however, the Ninth Circuit has completely ignored the principles discussed above and has applied the successorship doctrine in an unprecedented manner.[6] No other court has extended the doctrine in this fashion to strike down the job qualifications of an acquiring company without any showing that the qualifications were unlawful.

The precedent set by this decision should not be ignored merely because of the similarity between Western's former policy and Delta's policy. The similarities of the two policies are irrelevant to the Ninth Circuit's decision. Under the Ninth Circuit's decision, an employee who successfully established that his employer had unlawfully discriminated against him would be exempt from any independent job qualifications applied by a company that acquired the discriminating employer if those qualifications had the same effect on his employment as the acquired company's action. For example, if a terminated employee successfully established that his employer unlawfully terminated him because of an age restriction and was consequently reinstated, a company that acquired his employer would be *required* to hire that employee in the same position even if the employee did not meet the acquiring company's independent experience, skill or even eyesight qualifications. The acquiring company's status as a "successor" alone would prevent it from applying its own qualifications and the "successor" would have no opportunity to defend its qualifications as

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[6] The Ninth Circuit rejected Delta's argument presented here only after it mischaracterized it. Delta did not and does not contend that a successor can never be held liable for a predecessor's unlawful employment practice merely because it is an innocent party. Instead, Delta is contending that a successor can *only* be held liable under the successorship doctrine for the unlawful practices of the *predecessor* and *not* its own allegedly unlawful practices or qualifications. Liability for a *successor's* unlawful employment practices or qualifications can be established only through a direct action against the successor.

being lawful. Indeed, even if those qualifications had previously been upheld as lawful, the successor could not uniformly apply them because one of its new employees had been subjected to age discrimination by his prior employer.

Finally, the Ninth Circuit's unprecedented decision ignores and fails to serve the underlying purpose of the successorship doctrine as set forth by courts in other Circuits. In determining whether a successor should be required to remedy the acts of the predecessor employer that no longer exists, the courts balance the interests of the employees and the successor. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985); *In re National Air Lines, Inc.*, 700 F.2d 695, 698 (11th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983). When applied correctly, the successorship doctrine upholds the right of an employee to seek a remedy against an innocent acquiring company when it has acquired a discriminatory employer that no longer exists and when it is merely required to provide a remedy by hiring a specific qualified employee or group of employees. However, the precedent set by the Ninth Circuit's decision ignores that balancing of interests. The alleged discriminatory employer in this case (Delta) still exists and a remedy can be sought against it directly. The only burden upon Respondents in this case is the burden placed upon all individuals who claim they have been discriminated against by a prospective employer—the burden of proof of establishing employment discrimination in a lawsuit. Moreover, the burden upon Delta is certainly not de minimis. It was not merely required to hire a particular group of qualified employees but instead was required to ignore long-standing safety qualifications.[7] Delta has been de-

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[7] The Delta Second Officer qualifications at issue are based in part upon Delta's organization of its three-man cockpit crews. All three Delta cockpit crew members are pilots. The Second Officer position at Delta is an entry level training position in which a

nied the right to uniformly apply this qualification without the opportunity of defending its lawfulness as it has successfully done in the past.

The Ninth Circuit has applied the successorship doctrine in a unprecedented manner to create a special class of Delta pilots immune from Delta's presumptively valid flight safety qualifications. Delta is unaware of any reported decision in another Circuit that has extended the successorship doctrine in this manner. Delta submits that the Ninth Circuit's decision on this important matter conflicts in principle with the decisions of courts in other Circuits that restrict the use of the successorship doctrine to instances where the decision of the acquired company is at issue. Finally, the Ninth Circuit has decided an important question of federal law and created an expansive precedent in an area that has not been, but should be, addressed by this Court. Accordingly, consideration of this matter by this Court is essential.

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pilot observes and learns Delta's flying procedure. Delta has an "up-or-out" policy pursuant to which a Second Officer eventually qualifies for and advances to First Officer and ultimately to Captain. Those pilots who are unable to advance are terminated. This structure insures that the most senior pilot in the cockpit is the Captain who is the pilot in command. The next most senior pilot is the First Officer and the most junior pilot in the cockpit is the Second Officer. If senior former Captains are allowed to "bid-down" to the Second Officer position, the predictability of relationships in Delta's cockpits would be compromised and the utility of this training position would be lost. A Delta cockpit with the most senior pilot occupying the subordinate Second Officer position is more likely to be a cockpit in which the lines of authority and command responsibility are blurred. The resulting ambiguity of roles and relationships is likely to result in cockpit confusion, which is the antithesis of the predictable and safe environment sought by Delta.

II. By Determining That There Was Continuity Of An Acquired Company's Operations Under The "Successorship Doctrine" In An Employment Discrimination Action Where There Was To Be A Temporary Continuity Of Some Of The Acquired Company's Operations During A Transition Period But No Continuity Of The Acquired Company's Operations After The Acquisition Was Complete, The Ninth Circuit Has Conflicted In Principle With The Decisions Of Other Circuits And Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The Ninth Circuit determined that there would be substantial continuity of Western's operations after the acquisition and that therefore Delta was a "successor" to Western. That decision conflicted at least in principle with the decisions of other Circuits because the determination of continuity was based solely upon the extent of the integration of the predecessor into the acquiring company at the beginning of a transition period after which the predecessor would be completely integrated into the acquiring company. The Ninth Circuit thus chose a date that did not reflect the undisputed planned outcome of the acquisition to determine whether the acquisition would result in the substantial continuity of the operations of the acquired company. In doing so, the Ninth Circuit decided a vital question of federal law which has not been, but should be, addressed by this Court.

As described above, the purpose of an examination of the "successorship doctrine" in the employment discrimination context is to determine whether an innocent acquiring company will be required to remedy the unremedied, unlawful employment practices engaged in by the acquired company before the acquisition. *In re National Air Lines, Inc.*, 700 F.2d 695, 698 (11th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983); *EEOC v. MacMillan Bloedell Containers, Inc.*, 503 F.2d 1086, 1089 (6th Cir.

1974). Courts have adopted a nine-part, fact-specific inquiry to determine whether an acquiring company is a successor to an acquired company for purposes of an employment discrimination action. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985); *EEOC v. MacMillan Bloedell Containers, Inc., supra*, 503 F.2d at 1094; *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *Brown v. Evening News Association*, 473 F. Supp. 1242, 1244-1245 (E.D. Mich. 1979). These inquiries are: (1) whether the new company substantially continues the business operations of the acquired company; (2) whether the new company uses the same plant; (3) whether the new company uses the same or substantially the same work force; (4) whether the new company uses the same or substantially the same supervisory personnel; (5) whether the same jobs exist under substantially the same working conditions; (6) whether the new company uses the same machinery, equipment and methods of production; (7) whether the new company produces the same product; (8) whether the new company had notice of the charge against the acquired company; and (9) the ability of the predecessor to provide relief. *Id.*

The first seven of the above factors have been called the "continuity" or "sameness" factors. *Slack v. Havens*, 522 F.2d at 1095; *Musikiwamba v. ESSI, Inc., supra*, 760 F.2d at 751; *Brown v. Evening News Association, supra*, 473 F. Supp. at 1245. The focus of these continuity factors is to determine whether the acquiring company "essentially continues the operations of the former corporation." *In re National Air Lines, Inc., supra*, 700 F.2d at 698.[8]

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[8] Courts in other Circuits have held that the continuity factor is *the most important* consideration. For example, in *EEOC v. MacMillan Bloedell Containers, Inc., supra*, 503 F.2d at 1089, the Sixth Circuit referred to the continuity factor as the "key factor in the determination." And other courts have held that the continuity factor *must* be satisfied before an acquiring company can be considered a successor. *Forde v. Kee Lox Manufacturing*

The Court's application of the continuity factors in this case differed significantly from the application of those factors by courts in other Circuits. In finding that Delta would continue to operate Western as a separate entity after the acquisition, the Ninth Circuit and the District Court relied solely on the narrow factual conclusion that the pilot seniority lists for the Delta and Western pilots would not be fully integrated immediately upon the effective date of the acquisition. *See* pp. 4a, 8a, *infra*. Instead, Delta had decided that it would continue to use the Western pilots' seniority list for Western pilots and allow former Western pilots to fly former Western routes and equipment until an integrated pilot seniority list covering all Delta pilots had been agreed upon and adopted. Solely because of this transitional step, the Ninth Circuit held that Delta was continuing to operate Western as a separate entity indistinguishable from the pre-acquisition company and that doing so satisfied the "continuity of operations" factors of the successorship test.

The Ninth Circuit's conclusion differed with decisions of courts in other Circuits for at least two reasons. First, the Ninth Circuit focused on the continuity of only one group of employees rather than the overall operation of Delta's business after the acquisition. Courts in other Circuits, however, look to the substantial continuity of operations in the entire "business enterprise." *Forde v. Kee Lox Manufacturing Co., Inc.*, 584 F.2d at 4, 5 (2nd Cir. 1978); *EEOC v. MacMillan Bloedell Containers,*

Co., Inc., 585 F.2d 4, 5 (2nd Cir. 1978); *Burt v. Ramada Inn of Oxford, Mississippi*, 507 F. Supp. 336, 338 (N.D. Miss. 1980). In fact, the Seventh Circuit in *Musikiwamba v. ESSI, Inc., supra*, stated that the continuity factors were so important in cases such as this one (that involve a class of individuals seeking injunctive relief against the acquiring company) that "perhaps no amount of continuity would suffice" to render the acquiring company a successor. 760 F.2d at 751.

Inc., supra, 503 F.2d at 1089. Similarly, in applying the successorship doctrine in the labor law context, this Court views the "totality of the circumstances" in determining whether there is a substantial continuity "between the enterprises" after an acquisition. *Fall River Dyeing & Fininshing Corp. v. NLRB,* —— U.S. ——, 107 S. Ct. 2225, 2236, 2237 (1987). Accordingly, the Ninth Circuit ignored a large number of facts that would have been considered by courts in other Circuits that would have established that the "totality of circumstances" showed that Delta would not substantially continue the "business enterprise" of Western after the acquisition.[9]

Second, the Ninth Circuit reached its determination that Delta would continue to operate Western as a separate entity solely by viewing the expected status of the two pilot work forces on the first day after the effective date of the expected acquisition, rather than shortly thereafter when the contemplated acquisition would be complete and the two pilot groups would be fully integrated. No court has ever found an acquiring company to be a successor of the acquired company for purposes of employment discrimination liability by ignoring the undisputed expected result of an acquisition and relying on

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[9] For example, Delta presented undisputed evidence that Western's general offices would be closed and that Western employees in those facilities would be offered transfer to Delta offices. C.R. 425 at 3. Similarly, Delta presented undisputed evidence that, even if all former Western employees who were offered jobs with Delta accepted those employment offers, former Western employees would comprise only 23% of Delta's work force. C.R. 428 at 2, 4. In addition, seniority lists would be integrated to allow Western employees to fill available vacancies in Delta's system after the merger such that former Western employees would be working with Delta employees on a system-wide basis. C.R. 425 at 4; C.R. 428 at 3. Furthermore, Western employees who became Delta employees would largely work for different supervisors and many would be employed in different job classifications and work under different working conditions. C.R. 425 at 4, 5; C.R. 428 at 3, 4; Tr. 12.

such a narrow assessment of the expected facts at an arbitrary point along the acquisition and integration process.

Moreover, because this Court has never addressed the successorship doctrine in an employment discrimination context, the necessary factors upon which a successorship finding can be based are unclear. With its decision in this case, the Ninth Circuit had held that the successorship determination should be made on the first day after the effective date of the acquisition in spite of the fact that that date is the beginning rather than the end of a transition period. Thus, the Ninth Circuit arbitrarily focused on a point that would clearly be one of transition rather than repose.

Instead, the proper focus should be on the status of the acquiring company upon the completion of the acquisition and integration rather than upon a point in time somewhere along the way to that completion. Only then can it be established whether the acquiring company intended to maintain the business enterprise of the acquired company in substantially the same manner. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2234 (1987) (continuity established if "new employer makes *conscious decision* to maintain generally the same business") (emphasis added). To ignore the fact that an acquiring company intends to completely integrate the acquired company into itself solely because that integration will not occur immediately renders the traditional successorship standards meaningless. Obviously, a large corporation cannot fully integrate an acquired corporation into itself immediately after an acquisition. It takes time to integrate separate work forces with fairness and a minimum of disruption in the lives of employees and their families. The continuity factors are obviously designed to determine whether the operation of the acquired company will survive substantially intact after a post-acquisition integration, thereby

making it more equitable to transfer liability to the acquiring company. In this decision, however, the Ninth Circuit has created precedent in an important area of federal law that sets the date upon which the continuity factors should be applied at an illogical time that bears no relation to the purpose of those factors.

Finally, to ignore the fact that, after the dust settles on an acquisition, there will no longer be any continuity of the acquired company's business—and therefore no successorship—merely requires relitigation when that time comes. Such a result causes needless litigation and expense and ignores the purpose of the continuity factors of the successorship doctrine—to determine whether an acquiring company will essentially continue the business enterprise of an acquired company so that it is fair to require it to remedy certain unremedied, unlawful practices of the acquired company.

Accordingly, because of the Ninth Circuit's decision on this important and unsettled question, it is imperative that this Court settle this matter.

CONCLUSION

For the reasons stated above, Petitioner Delta Air Lines, Inc. respectfully requests that this Petition For Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the United States Court of Appeals
for the Ninth Circuit
October 12, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 87-5771

CHARLES G. CRISWELL;
EUGENE R. BLACK,
Plaintiffs-Appellees,

v.

DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted April 14, 1988
San Francisco, California

Filed: October 12, 1988

Before: BROWNING, NELSON AND CANBY, Circuit Judges.

MEMORANDUM

INTRODUCTION

This action had its genesis more than ten years ago when pilot Charles Criswell, and two other plaintiffs, were forced to retire at age 60 by Western Air Lines ("Western"). A jury found that Western had violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, when it (1) refused to allow DC-10 captains nearing the age of sixty to down-bid to the position of second officers (flight engineers), and (2) imposed a mandatory retirement age of sixty on second officers as a matter of company policy. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981). Final judgment and a permanent injunction were issued on May 13, 1981 by Judge Tashima.

This court affirmed the district court's decision. 709 F.2d 544 (9th Cir. 1983). A unanimous Supreme Court affirmed. 472 U.S. 400 (1985).

Western was acquired by and became a wholly-owned subsidiary of Delta Air Lines ("Delta"') in September 1986. The merger was consummated on April 1, 1987.

After the merger, Delta refused to continue Criswell and the fifteen other movants ("plaintiffs") as second officers although it did offer them unspecified ground-level positions. Delta contends that its action was necessary because of its policy prohibiting captains and first officers from "bidding-down" and serving as second officers.

Because of this refusal to continue their employment in cockpit positions, plaintiffs returned to Judge Tashima and moved to have defendant Western and respondent Delta held in contempt of court for failure to comply with the Final Judgment and Permanent Injunction in *Criswell v. Western Air Lines.* The district court granted

the motion, holding that Delta is a successor to Western and is thus bound by the *Criswell* injunction.

Delta argues that, for purposes of the *Criswell* injunction, it is not a successor to Western and can therefore remove Criswell and the other plaintiffs from cockpit positions. We agree with the district court's analysis that Delta is a successor to Western. We therefore AFFIRM.

DISCUSSION

Successorship

In an employment discrimination action, there are three principal factors relating to successor liability:

(1) continuity in operations and work force of the successor and predecessor employers;

(2) notice to the successor employer of its predecessor's legal obligation; and

(3) ability of the precessor to provide adequate relief directly.

Bates v. Pacific Maritime Ass'n, 744 F.2d 705, 709-10 (9th Cir. 1984) (imposing liability for a Title VII consent decree on successor employer); *See also Slack v. Havens*, 522 F.2d 1091, 1094-95 (9th Cir. 1975). Because the origins of successor liability are equitable, fairness is a prime consideration in its application. The emphasis, therefore, is on the second and third factors listed above.

> [T]wo factors [notice and ability to provide relief] are critical to the imposition of successor liability. The successor doctrine is derived from equitable principles, and it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief or when the successor did not have the opportunity to protect itself . . .

Musikiwamba v. Essi, Inc., 760 F.2d 740, 750 (7th Cir. 1985). *See Bates*, 744 F.2d at 710 ("These factors indicate that both fairness and necessity are inherent considerations in successorship analysis.").

Delta's Policies

In the present case, all of the elements for a finding of successorship are satisfied. First, there are continuity in operations and the work force of the successor and predecessor employers. There was ample evidence that during the post-merger period in question, the former Western flight operations were not integrated into Delta operations. Former Western personnel continued to fly former Western equipment on former Western routes, while Delta's pre-merger operations continued substantially unchanged. Second, Delta was on notice of Western's legal obligation; it filed an amicus brief in support of Western in *Criswell v. Western Air Lines.* Third, Western is clearly incapable of providing the relief required by the injunction; it no longer exists as a corporate entity. Delta, on the other hand, had and has the ability to provide adequate relief. The plaintiffs all down-bid to second officers positions while at Western; they could obtain complete relief if Delta simply retained them in the position they held at the time Delta acquired Western. Delta need not change its up-or-out policy as it applies to others in order to accord relief to plaintiffs. Since all three of the factors affecting successor liability weigh in favor of plaintiffs, the district court did not err in holding Delta subject to the Western injunction.

Delta nevertheless argues that successorship liability does not apply to the "independent" actions of an acquiring company. Should plaintiffs seek to challenge these "new" policies they can file a new action against Delta directly. Delta's argument ignores a basic tenet of successorship doctrine: the obligation imposed on the successor is preexisting. As this court noted in *Bates*, "[i]n

successorship cases, it is necessary to distinguish between the necessity for finding discrimination in the first instance, and the enforcement of an already established obligation against a successor employer . . . . Successorship liability, [] rests upon the consent decree itself, not upon some independent admission of wrongdoing." 744 F.2d at 709. Plaintiffs are not challenging Delta's new policies per se; they are simply insisting on a fulfillment of obligations owing to them because of Western's actions and the injunction remedying them. "[T]he disappearance by merger of a corporate employer . . . does not automatically terminate all rights of the [previous] employees . . .[;] the successor employer may [still] be required to arbitrate with the union under the [prior] agreement." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). Delta may be free to execute its own policies to other employees, but it is not free to abrogate its predecessor's obligations to plaintiffs under the injunction.

Challenge to Injunctive Relief

Delta's final argument, that petitioners must meet the criteria for injuntive relief, is misdirected; the real issue in this case is whether successorship liability attaches. Because the merits of Criswell's claims have already been adjudicated, and because the obligation is preexisting, the plaintiffs need not make an independent showing for injunctive relief. Nor need they file a new action.

> That the new employer is not a party of the consent decree is of course irrelevant, for that is the whole point of the successorship doctrine. The questions is whether the successorship doctrine applies and, if so, on what rationale.

Bates, 744 F.2d at 709. Determination of successorship is a highly fact-specific enterprise, and we find in the record no reason to disagree with the district court's

analysis. *See e.g., Howard Johnson Co., Inc. v. Detroit Local Joint Exe. Bd.*, 417 U.S. 249, 256 (1974); *Bates*, 744 F.2d at 709. Delta is a successor to Western for purposes of the *Criswell* injunction.

CONCLUSION

The judgment of the district court is affirmed. There is a continuity of operations between the merged airlines, Delta had notice of Western's obligations, and Delta has the ability to provide relief. The elements for successorship are satisfied. The district court did not err in finding that Delta has succeeded to the position of Western and is therefore bound by the Criswell injunction.

AFFIRMED.

Order of the United States District Court for the Central District of California March 30, 1987

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-78-2184-AWT (Gx)

CHARLES G. CRISWELL,
Plaintiff,

and

EUGENE R. BLACK, ROBERT P. ELLIOT, ERNEST F. ELLIS, ARLIE A. GILLESPIE, PETER T. HOFFMAN, JACK L. KEYES, BEN D. LAUBACHER, JR., ROBERT A. LONGWELL, ALAN L. MCLAREN, PHIL G. MOST, LYNN M. NORTON, GLEN P. SHANNON, DONALD C. THOMPSON, and HENRY J. WEIGAND,
Movants,

v.

WESTERN AIR LINES, INC.,
Defendant,

and

DELTA AIR LINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

ORDER

Plaintiff Charles G. Criswell and 14 movants, all flight officers of Western Air Lines, Inc. who are over 60 years of age, have moved against Western and Delta Air Lines,

Inc. for a citation of civil contempt and for further relief for failure to obey the judgment and the injunction in this case, entered May 13, 1981. On the basis of the submissions before the Court and the arguments of counsel, the following is ORDERED:

1. Plaintiff's motion is granted as recited herein:

2. Delta is a successor to Western and is bound by the Criswell injunction (attached and incorporated herein) with respect to the employment of plaintiff and movants. It appears to the Court that Western's and Delta's flight operations will not be fully integrated until some time in the future. At this point, then, Delta is a successor for the purposes of the pending motion. The Order is limited to these 15 individuals who are being permitted to continue their employment as Second Officers, and does not apply to those who in the future may seek to transfer, or "down-bid" from Captain to Second Officer at age 60 or to serve as Second Officer after age 60.

3. Delta will not suffer significant harm or hardship because of this Order.

4. The Court considers this Order to be a final, appealable order.

5. Delta's motion for a stay of this Order is denied. Delta has not shown a likelihood of succeeding on the merits on the issue of whether it is a successor to Western for the purposes of the plaintiff's and movants' motion.

Dated: March 30, 1987
2:00 p.m.

/s/ A. Wallace Tashima
United States District Judge

Approved as to form except as noted below:

Delta and Western request that the order expressly state:

This is a final order which modifies the May 13, 1981 injunction by applying it to Delta as stated herein. The order therefore is immediately appealable.

/s/ William H. Boice
Attorney for Defendant Western
and Respondent Delta

Plaintiff's and movants' response to above exception:

The Court ruled that it considered its Order to be a final, appealable Order, The Court did not rule that it was "modifying" the *Criswell* injunction and we submit that the Court did not, in fact, modify the injunction.

/s/ Raymond C. Fay
Attorney for Plaintiff and
Movants

No. 88-1138

Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DELTA AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL,
Respondent,

and

EUGENE R. BLACK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS CHARLES G. CRISWELL, *et al.* IN OPPOSITION

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February 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the successorship doctrine was properly applied to require the continued employment of 15 pilots who were already working as flight engineers past age sixty pursuant to the Final Judgment and Permanent Injunction in *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1138

DELTA AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL,
Respondent,

and

EUGENE R. BLACK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS CHARLES G. CRISWELL, *et al.* IN OPPOSITION

Respondents Charles G. Criswell, *et al.*[1] respectfully pray that the Petition for a Writ of Certiorari of Delta Air Lines, Inc. ("Delta") be denied.

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[1] The other respondents are: Eugene R. Black, Ernest F. Ellis, Arlie A. Gillespie, Peter T. Hoffman, Jack L. Keyes, Ben D. Laubacher, Jr., Robert A. Longwell, Alan L. McLaren, Phil G. Most,

COUNTERSTATEMENT OF THE CASE

The Court of Appeals correctly summarized the history of the case as follows (A. 2a):

> This action had its genesis more than ten years ago when pilot Charles Criswell, and two other plaintiffs, were forced to retire at age 60 by Western Air Lines ("Western"). A jury found that Western had violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ["ADEA"], when it (1) refused to allow DC-10 captains nearing the age of sixty to down-bid to the position of second officers (flight engineers), and (2) imposed a mandatory retirement age of sixty on second officers as a matter of company policy. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981). Final judgment and a permanent injunction were issued on May 13, 1981 by Judge Tashima.
>
> This court affirmed the district court's decision. 709 F.2d 544 (9th Cir. 1983). A unanimous Supreme Court affirmed. 472 U.S. 400 (1985).

The March 13, 1981 *Criswell* injunction, attached to and incorporated by reference in the district court's successorship order (A. 8a) but omitted from Delta's Appendix, is included in the Supplemental Appendix to this opposition (S.A. 1a). The *Criswell* systemwide injunction reads in relevant part (S.A. 4a-5a):

> Western, its officers, agents, servants, employees, and attorneys and all persons in active concert or participation with it who receive actual notice of this Final Judgment and Permanent Injunction and Western's successors and assigns, are hereby permanently enjoined from:
>
> (a) Refusing or failing to permit its flight deck crew members to work or continue to work as second officers after age 60 for any reason based on age.

Lynn M. Norton, Glen P. Shannon, Donald C. Thompson and Henry J. Wiegand. Robert P. Elliott was an appellee below but Delta did not petition as to him.

(b) Refusing or failing to consider or act favorably upon downbids by captains or first officers for second officer positions for any reason based on age.

(c) Continuing to enforce its policy of requiring all flight deck personnel, including second officers, to retire at age 60.

(d) Any further violation of Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a).

Respondent Criswell was reinstated after trial in 1981 (C.R. 421(a) at 2). Five of the respondents were reinstated in related litigation, *Stone v. Western Air Lines, Inc.*, 34 Empl. Prac. Dec. [CCH] ¶ 34,351 (C.D. Cal. 1984); *see Stone v. Western Air Lines, Inc.*, 39 Empl. Prac. Dec. [CCH] ¶ 35,908 (C.D. Cal. 1985), and the remaining respondents turned age sixty and continued as flight engineers after the 1981 *Criswell* injunction became finally effective following this Court's decision in 1985.

During the *Criswell* litigation, Delta supported Western's attempts to exclude from the cockpit pilots over age sixty. On November 15, 1984, Delta filed a brief *amicus curiae* in this Court in support of Western's position in *Criswell* (C.R. 421(c) Exh. A).

Western and Delta agreed to merge on September 9, 1986 (C.R. 421(c) Exh. F at I-1). Stockholder approval was secured on December 16, 1986 (*see* C.R. 425 at 3). Delta operated Western as a wholly-owned subsidiary thereafter until April 1, 1987, when Western ceased to exist as a corporate entity (C.R. 425 at 3).

In the merger Delta offered jobs to all Western employees below the officer level (C.R. 425 at 2). All Western pilots except respondents were to be hired as pilots (C.R. 428 at 3). By letter dated February 13, 1987, Delta advised respondents that it refused to provide them cockpit positions as Second Officers because

"Delta does not allow pilots disqualified from future service by the Age 60 FAR [2] or other reasons to serve in any cockpit positions." (C.R. 421(a) Exh. B). Delta did not attempt to sever the employment rights of any of the other approximately 1,500 Western pilots, including those who had exercised "hundreds of downbids in a wide variety of circumstances." *Criswell*, 514 F. Supp. at 392.

After the merger, the former Western flight operations remained separate and distinct from Delta's. Former Western pilots continued to fly former Western planes over former Western routes (C.R. 431 at 3-4 and Exhs. C-E), albeit under Delta's name. The pilot seniority lists were not yet merged and, until that took place, the "flight operations, equipment and routes of each company" were to remain separate (C.R. 431, Exh. E at 4). In its March 30, 1987 successorship order, the district court found that "Western's and Delta's flight operations will not be fully integrated until some time in the future" (A. 8a).

In opposing a finding of successorship in this case, Delta relied heavily on its "policy" against "two-step downbidding" that was in issue in *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1300 (1987). In this case, Delta made no independent evidentiary showing regarding its "policy." Instead, it relied upon the reported opinion in *Iervolino*. There is nothing in *Iervolino* to indicate that Delta had ever previously applied its policy to persons like respondents who were already in the flight engineer position after having attained the rank of Captain in the normal progression.

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[2] The FAA's "Age 60 Rule," 14 C.F.R. § 121.383(c). The rule applies to Captains and First Officers, but not to Second Officers or flight engineers. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 404 (1985).

Iervolino was a single-plaintiff case which challenged Delta's refusal to allow a Captain to "downbid" to flight engineer at age sixty. In *Iervolino*, Delta presented many defenses, only one of which was a restriction on downbidding. Not only did Delta claim, as Western did in *Criswell*, that to be younger than sixty was a "bona fide occupational qualification" for the Second Officer position for reasons relating to age, but Delta made repeated attacks on Iervolino's health throughout the trial. It was therefore impossible to conclude, given the general verdict, how or on what issues the jury decided the case for Delta. The trial court entered judgment on the general verdict. The Court of Appeals affirmed the denial of a motion *j.n.o.v.*, and concluded that the jury instructions were either correct, not objected to, or incorrect but harmless error. Delta never sought or obtained a declaratory judgment, and neither the jury nor the courts ever expressly upheld Delta's "policy."

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE SUCCESSORSHIP DOCTRINE

The Court of Appeals made a routine application of the successorship doctrine that has been developed in a series of labor law opinions in this Court[3] and has been applied uniformly in employment discrimination cases in the Courts of Appeals.[4] Although Delta states that it is

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[3] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Fall River Dyeing & Finishing Corp. v. NLRB*, 428 U.S. 427, 107 S. Ct. 2225 (1987).

[4] *Bates v. Pacific Maritime Ass'n*, 744 F.2d 705 (9th Cir. 1984); *Musikiwamba v. ESSI, Inc.*, 769 F.2d 740 (7th Cir. 1985); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974).

important for the Court to grant the petition because it has not decided a successorship case in the employment discrimination context, Delta does not dispute that the successorship doctrine applies in employment discrimination cases.

There is no conflict in the Circuits regarding the application of the successorship doctrine. The Ninth Circuit stated (A. 3a):

> In an employment discrimination action, there are three principal factors relating to successor liability:
>
> (1) continuity in operations and work force of the successor and predecessor employers;
>
> (2) notice to the successor employer of its predecessor's legal obligation; and
>
> (3) ability of the predecessor to provide adequate relief directly.

The above formulation is derived from *Bates*, 744 F.2d at 709-10, not cited in the petition. The *Bates* formulation is a condensation of the nine-part formulation in *Slack v. Havens*, 522 F.2d 1091, 1094-95 (9th Cir. 1975). Other circuits are in accord with this formulation. *Musikiwamba*, 760 F.2d at 750; *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d at 1094. Delta's petition presents no issue of importance or conflict regarding the Ninth Circuit's formulation of the successorship doctrine that warrants review by this Court.

II. DELTA'S "POLICY" DOES NOT CREATE AN EXCEPTION TO THE SUCCESSORSHIP DOCTRINE

Delta argues that its "policy" against "two-step downbidding" prevents the application of the successorship doctrine in this case. The Court of Appeals rejected Delta's argument as a matter of law, holding essentially that it was an impermissible collateral attack on the successorship doctrine itself (A. 4a-5a), and upheld the dis-

trict court's "highly fact-specific" successorship analysis (A. 5a-6a) which included consideration of Delta's "policy" as one of the equitable concerns to be taken into account. This treatment by the Court of Appeals is fully consistent with the way other courts have interpreted the successorship doctrine.

Delta's argument that Mr. Criswell should be forced to undergo another decade of costly litigation in a new action against Delta undermines the very purpose of the successorship doctrine. As the Court of Appeals explained (A. 4a-5a):

> Delta's argument ignores a basic tenet of successorship doctrine: the obligation imposed on the successor is preexisting. As this court noted in *Bates*, "[i]n successorship cases, it is necessary to distinguish between the necessity for finding discrimination in the first instance, and the enforcement of an already established obligation against a successor employer . . . . Successorship liability, [] rests upon the consent decree itself, not upon some independent admission of wrongdoing." 744 F.2d at 709. Plaintiffs are not challenging Delta's new policies per se; they they are simply insisting on a fulfillment of obligations owing to them because of Western's actions and the injunction remedying them. "[T]he disappearance by merger of a corporate employer . . . does not automatically terminate all rights of the [previous] employees . . .[;] the successor employer may [still] be required to arbitrate with the union under the [prior] agreement." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). Delta may be free to execute its own policies to other employees, but it is not free to abrogate its predecessor's obligations to plaintiffs under the injunction.[5]

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[5] Similarly, the Court of Appeals rejected Delta's argument that respondents needed to meet separately the criteria for injunctive relief (A. 5a):

> Delta's final argument, that petitioners must meet the criteria for injunctive relief, is misdirected; the real issue in this

Delta's attempt to circumvent these successorship principles is distinguished principally by a lack of candor. Delta argues that respondents were "unqualified" employees mounting an independent challenge to Delta's "presumptively lawful" downbidding policy. First, Delta's policy is not "presumptively lawful." In *Iervolino*, Delta raised numerous defenses and obtained a general verdict against a single plaintiff. In affirming the verdict, the Eleventh Circuit did not uphold, validate, or otherwise declare "presumptively lawful" Delta's downbidding policy. Second, respondents did not challenge Delta's policy, nor did they need to, because they were already working as flight engineers for up to six years and therefore were not seeking to downbid like the plaintiff in *Iervolino*.[6] Third, the successorship order here did not require Delta to "hire unqualified Western employees." Like the other 1,500 former Western pilots, respondents met all of Delta's job qualifications, except for the age barrier proscribed by the *Criswell* injunction.[7] Thus, this case simply

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case is whether successorship liability attaches. Because the merits of Criswell's claims have already been adjudicated, and because the obligation is preexisting, the plaintiffs need not make an independent showing for injunctive relief. Nor need they file a new action.

> That the new employer is not a party of the consent decree is of course irrelevant, for that is the whole point of the successorship doctrine. The question is whether the successorship doctrine applies and, if so, on what rationale.

Bates, 744 F.2d at 709.

[6] Although Delta argued in *Iervolino* that its policy was not age-based, here Delta applied it only to the 15 individuals who were age sixty. Delta did not apply the policy to bar the employment of any of Western's other 1,500 pilots, including numerous younger downbidding pilots. At Western, there were "hundreds of downbids in a wide variety of circumstances," *Criswell*, 514 F. Supp. at 392, including "two-step" downbids from Captain to flight engineer by pilots under age sixty. *Id.*

[7] The *Criswell* injunction barred Western from refusing to employ flight engineers "because of age" (S.A. 5a) and did not, as Delta

does not present the hypothetical facts urged in the petition concerning a challenge by unqualified employees to a policy that has been held lawful under prior court orders. Delta was far more candid about the limited scope and effect of the successorship order in describing the order to another court:

> That Order did not affect *any Delta* pilots or even other similarly situated former Western pilots. It is specifically limited to the 15 movants. More importantly, in that action, plaintiffs did not purport to challenge Delta's policy and the court did not hold that *Delta's* policy was unlawful. Accordingly, Delta's merger of Western into itself and the limited successorship finding with respect to 15 former Western pilots has no relevance to former Delta pilots or the presumptive lawfulness of Delta's independent policy.[8]

Stripped of its mischaracterizations, Delta's petition presents no issue of conflict among the Circuits in treatment of the successorship doctrine, either in the holdings of the courts or "in principle" (Pet. 12). Delta's attack on the factual successorship finding is merely an attempt to elevate the importance of Delta's policy above all other facts before the district court. Delta ignores the admonition by this Court that the successorship inquiry "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2236. Furthermore, the "successor doctrine is derived from equitable principles." *Musikiwamba*, 760 F.2d at 750; *see Bates*, 744 F.2d at 710-711. The court seeks to balance the pur-

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argues, force Delta to take on employees who "did not meet the acquiring company's independent experience, skill or even eyesight qualifications" (Pet. 10).

[8] September 28, 1987, "Defendant's Memorandum of Law in Opposition to Plaintiff's Application for Preliminary Injunction," *Owen v. Delta Air Lines, Inc.*, No. 3-86-1227-T (N.D. Tex.) at 11 (footnote omitted, emphasis in original).

poses of the underlying legislation—here the ADEA—with the legitimate interests and expectations of the affected employees and employer. *Bates*, 744 F.2d at 709. In making its successorship determination here, the district court balanced the interests involved by taking the *Iervolino* policy fully into account as one of the "equitable concerns," *Bates*, 744 F.2d at 711 (Tr. 40-41; *see id.* at 34-36), and by finding that Delta would suffer no significant harm or hardship from having to employ the respondents (A. 8a). In upholding the district court's factual findings, the Court of Appeals emphasized the limited scope of the successorship order and its lack of impact on the *Iverolino* policy. The Court of Appeals stated that "Delta need not change its up-or-out policy as it applies to others in order to accord relief to plaintiffs" (A. 4a), and concluded: "Delta may be free to execute its own policies to other employees, but it is not free to abrogate its predecessor's obligations to plaintiffs under the injunction" (A. 5a). Delta has presented no issue of novelty or importance that would warrant this Court's review of the "highly fact-specific enterprise" (A. 5a) of successorship determination in this case.

III. THE "CONTINUITY" FACTOR WAS PROPERLY APPLIED

The Court of Appeals' treatment of the "continuity" or "sameness" prong of the successorship test is fully consistent with the treatment given it by this and other courts, both in the context of the successorship doctrine as a whole as well as in the context of the narrow objections raised by Delta here. In advocating a mechanistic application of the continuity test, Delta disregards this Court's admonition that successorship is determined by the "totality of the circumstances." *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2237. Delta also disregards the two factors which are "critical to the imposition of successor liability," *Musikiwamba*, 760 F.2d at

750 (A. 3a-4a)—notice to the successor of the predecessor's obligation and the inability of the predecessor to provide relief—which were not in dispute in this case.

Delta argues that the Ninth Circuit's finding of continuity conflicts "at least in principle" with the decisions of other Circuits because the Court of Appeals picked the wrong date to apply the continuity factor. Again, Delta boosts its argument with a mischaracterization of the record. April 1, 1987 was not "the first day after the effective date of the expected acquisition" (Pet. 16). Delta and Western agreed to merge in September 1986 (C.R. 421(c) Exh. F at I-1). The merger was effective in December 1986 and Western was operated thereafter as a wholly-owned subsidiary of Delta until the merger was completed on April 1, 1987 (C.R. 425 at 2-3; A. 2a). Thus, April 1 was not the "beginning of a transition period" (Pet. 13), but rather was a date months after Delta acquired Western.

There is no authority to support the proposition that successorship determination should await some wholly arbitrary future date set by the acquiring company "after the dust settles" (Pet. 18). In duty-to-bargain successorship cases where the appropriate date to determine successorship has been in issue, the NLRB's "substantial and representative complement" standard has been approved in lieu of a "full complement" standard. *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2238; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985). The "complement" test is obviously important in the collective bargaining context, because the determination of the will of the majority may shift with changes in workforce composition. In the employment discrimination context, however, individual rights are at stake, so there is no reason to wait beyond the change in the employment relationship to determine successorship. In any event, even the "complement" tests were met here. By taking on virtually all Western employees,

Delta achieved both a "substantial and representative" and "full" complement of employees immediately after the merger.

Delta also argues that the Ninth Circuit incorrectly focused on the pilot group and flight operations, instead of "the overall operation of Delta's business after the acquisition" (Pet. 15). Delta's argument ignores the specific scope of the successorship inquiry here, which was limited to the employment of 15 pilots, and ignores this Court's acknowledgement that an employer may be a successor for some purposes and not others. *Howard Johnson Co.*, 417 U.S. at 249, 262 n. 9. Delta is also incorrect in asserting that the successorship finding was based "solely on the narrow factual conclusion" that the pilot seniority lists were not integrated (Pet. 15). As the Court of Appeals explained, continuity extended to the entirety of the carriers' flight operations (A. 4a).

CONCLUSION

For the foregoing reasons, Delta's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 1989

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-2184 AWT

CHARLES G. CRISWELL, ALBERT RON, RULON H. STARLEY,
Plaintiffs,

v.

WESTERN AIR LINES, INC.,
Defendant.

FINAL JUDGMENT AND PERMANENT INJUNCTION

[Filed May 12, 1981]

This action came on for trial before the Court and a jury and the issues having been duly tried and the jury having duly rendered its verdict and the Court having signed and filed its findings of fact and conclusions of law in the form of a memorandum opinion, pursuant to Rule 52(a), Fed. R. Civ. P.,

IT IS ORDERED, ADJUDGED AND DECREED:

A. *Money Judgments*

1. *Plaintiff Criswell.* The jury returned a verdict for Criswell and against defendant Western Air Lines, Inc. ("Western") in the amount of $50,393.87. This verdict

covers the 28-month period from August 1978 to November 1980. Criswell is awarded additional liquidated damages in a like amount of $50,393.87. Criswell is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46.

Recap of Damages Payable by Western to Criswell:

Actual pre-verdict damages	$ 50,393.87
Liquidated damages	50,393.87
Actual post-verdict damages	30,698.46
Total	$131,486.20

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $50,393.87 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

2. *Plaintiff Starley.* The jury returned a verdict for Starley and against Western in the amount of $52,088.94. Starley is awarded additional liquidated damages in a like amount of $52,088.94. Starley is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46.

Recap of Damages Payable by Western to Starley:

Actual pre-verdict-damages	$ 52,088.94
Liquidated damages	52,088.94
Actual post-verdict damages	30,698.46
Total	$134,876.34

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $52,088.94 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate

of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

3. *Plaintiff Ron.* The jury returned a verdict for Ron and against Western in the amount of $5,000. Because Ron has continued working pursuant to a preliminary injunction, no damage adjustment is necessary. He is, however, awarded additional liquidated damages in a like amount. The total money judgment in favor of Ron is $10,000. No prejudgment interest is awarded to plaintiff Ron.

B. *Equitable Decree.*

1. Plaintiffs Criswell and Starley shall immediately be reinstated as employees by Western under the following terms and conditions:

(a) Full seniority on the pilot seniority list, as of their respective, original dates of hire as pilots.

(b) Each such plaintiff shall be awarded a position as DC-10 second officer, either as was originally bid by him or any other position as to which plaintiff would have been entitled to have his bid awarded which was opened for bidding on or after each such plaintiff's retirement.

(c) Full salary reflecting each such plaintiff's seniority and position.

(d) In-house training customarily given by Western to DC-10 pilots downbidding or downgraded to DC-10 second officers.

(e) Western shall restore to the respective pension trusts all amounts paid under the Western-ALPA Fixed and Variable Pilot Pension Plans to plaintiffs Criswell and Starley. In satisfying the money judgments in favor of said plaintiffs, however, Western may offset all

amounts paid to them under the Variable Plan subsequent to November 1980.

2. Plaintiff Ron shall be continued in his employment by Western as a DC-10 second officer. He shall retain his position on the pilot seniority list.

3. With respect to all plaintiffs, Western:

(a) Shall continue to make regular, required contributions to the Pilots Variable Pension Plan for each plaintiff's account.

(b) Shall allow each plaintiff to elect whether or not to commence receipt of the benefits to which he is entitled under the Pilots Fixed Pension Plan retroactive to his sixtieth birthday or upon actual retirement. Said election shall be made within thirty (30) days hereof. If any plaintiff elects retroactive commencement of pension payments, all back payments shall be at seven percent (7%) interest from accrual to payment. If any plaintiff elects deferral to actual retirement date, his benefits shall be actuarially adjusted to reflect the shorter life expectancy resulting from such deferred commencement.

(c) May, until the first renewal of the Pilot Agreement, require, in addition to current medical certificates required by the Federal Aviation Administration, such further medical examinations as Western deems necessary or appropriate to enable it to discharge its responsibilities as a certificated air carrier. Such examinations shall be at Western's expense.

(d) Shall not require plaintiffs to retire and shall not discriminate against any of them in the terms, conditions or privileges of their employment for any reason based on age, prior to plaintiffs' respective seventieth birthdays.

4. Western, its officers, agents, servants, employees, and attorneys and all persons in active concert or par-

ticipation with it who receive actual notice of this Final Judgment and Permanent Injunction and Western's successors and assigns, are hereby permanently enjoined from:

(a) Refusing or failing to permit its flight deck crew members to work or continue to work as second officers after age 60 for any reason based on age.

(b) Refusing or failing to consider or act favorably upon downbids by captains or first officers for second officer positions for any reason based on age.

(c) Continuing to enforce its policy of requiring all flight deck personnel, including second officers, to retire at age 60.

(d) Any further violation of Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a).

The provisions of paragraph B.3 of this Final Judgment and Permanent Injunction shall apply to this paragraph 4.

5. Western shall require that its chief executive officer and all officers who have any responsibility over flight operations and flight deck personnel be furnished with a copy of and read part B of this Final Judgment and Permanent Injunction. Within 60 days of the date hereof, Western's chief executive officer or such other officer as may be delegated by him for this purpose, shall file and serve an affidavit of compliance, certifying that the provisions of this paragraph 5 have been complied with.

6. The Court reserves jurisdiction over this action to alter, amend, modify and enforce this Final Judgment and Permanent Injunction.

C. *Attorneys' Fees and Costs.*

Plaintiffs are awarded reasonable attorneys' fees, the amount of such award to be determined by an order after judgment, as provided in the memorandum opinion filed concurrently herewith.

Plaintiffs shall recover of defendant their costs of suit.

Dated: May 12, 1981

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge